In The

SUPREME COURT OF THE UNITED STATES

October Term, 1972

No. 72-1564

VINCENT J. BERNABEI,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals
For the Sixth Circuit

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UNITED STATES OF AMERICA,

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PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals
For the Sixth Circuit

Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered on February 28, 1973, and reaffirmed April 26, 1973.

OPINIONS BELOW

The United States District Court rendered no formal opinion.

The order of the United States Court of Appeals is attached as exhibit, including the denial of the petition for a rehearing.

JURISDICTION

The judgment of the Court of Appeals was entered February 28, 1973 and reaffirmed April 26, 1973. The jurisdiction of this Court is invoked under 28 USC 1254 (1).

QUESTIONS PRESENTED

Whether the trial Court deprived petitioner of due process of law in refusing to allow defendant to introduce evidence that in the years involved he was suffering from financial difficulties and marital problems, which evidence, if allowed, would have permitted the jury to consider whether the defendant had willfully failed to file income tax returns, or that such failure was due to innocent causes.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitution of the United States, 5th Amendment (deprivation of liberty) (P. 12 infra)

Internal Revenue Code 1954 Section 7203, 26 USC Section 7203.

STATEMENT OF FACTS

The defendant, Vincent J. Bernabei, was charged on an information in four counts filed in the United States District Court for the Northern District of Ohio, Eastern Division, on February 3, 1972, with willfully failing to file income tax returns for the years 1965, 1966, 1967, and 1968, all in violation of Section 7203, Internal Revenue Code of 1954, 26 USC Section 7203. The defendant was tried before a jury, the Honorable Robert Krupansky, D.S., presiding. After four days of trial, appellant was found guilty

on all counts. On May 19, 1972, the appellant was sentenced to one year and $5,000.00 fine on each count, to run consecutively, the total sentence being four years and $20,000.00, four months to be served in jail and the balance probation, provided that the fine is paid within three years. Defendant's motion for a new trial was overruled on June 1, 1972. On June 5, 1972, the defendant filed his notice of appeal.

Vincent Bernabei is forty-six years of age, and during the years here involved was married and the father of five minor children. He resided in Canton, Ohio, and has practiced law there since 1955. In 1968 he was divorced from his wife.

In 1963 and 1964 Bernabei was investigated by Revenue Agents for not filing 1959, 1960, and 1962 returns. The case was settled by his filing late returns, and payment of the taxes.

On August 19, 1968, Internal Revenue Agent George R. Tabeling was assigned to investigate the income tax returns of Vincent Bernabei. He could find no record of returns filed for 1965, 1966, or 1967. On May 15, 1969, he visited Mr. Bernabei at his law office in Canton, Ohio. He introduced himself as a Revenue Agent and showed Mr. Bernabei his credentials and asked him, "Have you filed tax returns?" Mr. Bernabein said, "No." Mr. Tabeling then suspended his investigation and referred the case to the Intelligence Division for potential fraud. Subsequently, the case was investigated by Special Agent Robert Rader. Mr. Rader completed his investigation and report. As a result, an information was filed against Mr. Bernabei in the United States District Court for the Northern District of Ohio, Eastern Division, charging him with willful failure to file income tax returns for 1965, 1966, 1967 and 1968, in violation of Section 7203, Internal Revenue Code of 1954, 26 U.S. Code, Section 7203.

The Government's evidence consisted of taxpayer's cash receipts books for the years 1965, 1966, 1967, and 1968; partially completed and unfiled tax return forms for 1965, 1966; and a paper containing tax information prepared by the defendant for the year 1967, — all of which were given to Internal Revenue investigators voluntarily by defendant. Taxpayer had admitted he had not filed income tax returns for these years, and this fact was corroborated by testimony of an Internal Revenue officer and by official records.

In an attempt to corroborate the income information furnished by the taxpayer, the Government presented in trial twelve witnesses' testimony, which indicated gross fees paid to the defendant of $1,873.00 in 1965; $3,944.52 in 1966; $2,724.00 in 1967; $2,558.00 in 1968. The information alleged gross income of $30,879.00 in 1965; $25,208.00 in 1966; $30,112.00 in 1967; $31,845.00 in 1968. Taxpayer's incomplete records for 1965, 1966, and 1967 showed costs of business in salaries and office expenses of $7,965.99, $6,779.70 and $4,337.00 for the years 1965, 1966, and 1967 respectively. There was no evidence of expenses for the year 1968.

Bernabei's records of receipts were substantially in agreement with his unfiled tax returns for 1965 and 1966, and his incompleted tax information records for 1967. All four years showed gross receipts per Bernabei's records in amounts ranging from approximately $23,000.00 to $29,500.00. In the trial Revenue Agent Tabeling testified that when Mr. Bernabei was asked why he did not file, he said he did not have enough money to pay the taxes.

Revenue Agent Theodore Pergins, who had conducted a prior examination of the defendant relative to his tax returns for the years 1959, 1960, and 1962, testified that in his final report (no criminal prosecution) he made the statement that the taxpayers (Mr. and Mrs. Bernabei) were

"heavily in debt, as they have borrowed money from various finance companies, and so forth".

Defendant's motion for acquittal when the prosecution rested was denied. When the defendant was testifying, the Court refused to allow him to testify concerning his financial and marital difficulties, as an explanation that his failure to file was involuntary and not willfull. The defense proffered his testimony that this was the reason for his failure to file tax returns and also proffered supporting bank statements.

REASONS FOR GRANTING WRIT

The question presented in this proceeding is important since it relates to the question of whether the defendant was given a fair trial because of the trial Court's refusal to permit him to present his defense. There is a conflict in the District Courts and the Circuit Courts as to what constitutes willfullness in the misdemeanor offense of willful failure to file a tax return. In *U.S.* v. *Spies,* 317 U.S. 492, the Supreme Court held that the financial condition of a taxpayer might well have some bearing on the willfullness and intent, especially in an offense of willfull failure to pay. In *U.S.* v. *Murdock,* 290 U.S. 389, the Supreme Court indicated that willfullness meant something done with a bad purpose or an evil motive. In *Yarborough* v. *U.S.,* 230 Fed. 2nd 56 (4th Circuit), cert. denied 351 U.S. 696, the Court approved instructions to the jury that the testimony that the defendant did not have sufficient cash to pay the tax was evidence that the jury had a right to consider along with all the other facts. To the contrary, in *U.S.* v. *Haseltine,* 419 Fed. 2nd 579 (9th Circuit), it held that the trial Court's rejection of evidence relating to the defendant's inability to pay taxes was proper.

The taxpayer in this present case was, during the years involved, driven to a point of distraction not only by his financial worries but also by the disruption of his home caused, among other equally distressing things, by his wife leaving several times. He was aware that, if he did file tax returns and did not pay the tax, the Internal Revenue Service under its collection power could seize his assets and destroy his ability to continue in the law practice.

It is well established that proof of criminal intent can be shown by surrounding circumstances and collateral facts, and that intent can be inferred from all of these factors. Certainly, to give the defendant a fair hearing, he should likewise be able to establish all surrounding conditions and circumstances from which an inference of innocence might be drawn.

In this present proceeding the jury was allowed to see only one side of the coin — that presented by the prosecution. The defendant was prevented by the Court's ruling from explaining and showing to the jury the circumstances on which he relied to prove that his omissions were not willfull and were due to innocent cause. Uuder the Trial Court's ruling the jury never had an opportunity to decide whether taxpayer had an innocent cause for not filing.

In view of the divergence of the Circuit Courts and the importance of establishing rules for a fair trial in this type of case, it is submitted that this Writ of Certiorari should be granted.

CONCLUSION

For the reasons stated, the petitioner respectfully prays that this petition for a Writ of Certiorari be granted.

Respectfully submitted,

.....

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APPENDIX

No. 72-1866

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

VINCENT J. BERNABEI,
Defendant-Appellant,

v.

UNITED STATES OF AMERICA,
Plaintiff-Appellee.

APPEAL from United States District Court for the Northern District of Ohio, Eastern Division.

Decided and Filed February 28, 1973.

Before: EDWARDS and PECK, Circuit Judges, and WILSON, District Judge.*

PER CURIAM. Defendant-appellant, who is an attorney, perfected this appeal from his conviction for failure to file federal income tax returns for the year 1965 through 1968. On this appeal appellant contends principally that the trial judge erred in refusing to permit him to introduce evidence of marital and financial difficulties, as to which proffers were made. It is his contention that in failing

* Honorable Frank W. Wilson, Chief Judge of the United States District Court for the Eastern District of Tennessee, sitting by designation.

to file the returns in question he "had no evil motive . . ., but due to pressures and stress, neglected, without any criminal intent, to file his returns when due." It is here concluded that evidence of financial and domestic problems are not relevant to the issue of willfulness as the term is used in the statute under which appellant was charged and in the indictment, and that the evidence was properly excluded.

It is further concluded that the other contentions presented on appeal are without merit, and the judgment of the District Court is affirmed.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 72-1866

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

vs.

VINCENT J. BERNABEI,
Defendant-Appellant.

Before: EDWARDS, PECK, Circuit Judges and WILSON, District Judge.

JUDGMENT

(Filed February 28, 1973.)

APPEAL from the United States District Court for the Northern District of Ohio

THIS CAUSE came on to be heard on the record from the United States District Court for the Northern District of Ohio and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed.

No costs taxed.

Entered by order of the Court.

/s/ JAMES A. HIGGINS
Clerk

NO. 72-1866

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

VINCENT J. BERNABEI,
Defendant-Appellant

v.

UNITED STATES OF AMERICA,
Plaintiff-Appellee.

ORDER

(Filed April 26, 1973)

Before: EDWARDS and PECK, Circuit Judges, and WILSON, District Judge.

Appellant having filed a petition for rehearing with this Court, and this Court having considered said petition and being duly advised in the premises,

IT IS ORDERED that the petition for rehearing be, and it is, hereby denied.

ENTERED BY ORDER OF THE COURT

/s/ JAMES A. HIGGINS
Clerk

CONSTITUTIONAL PROVISIONS

Amendment 5:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of War or public danger, nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

RELEVANT SECTIONS OF THE INTERNAL REVENUE CODE

Section 7203:

"WILLFUL FAILURE TO FILE RETURN, SUPPLY INFORMATION OR PAY TAX.

"Any person required under this title to pay any estimated tax or tax, or required by this title or by regulations made under authority thereof to make a return (other than a return required under authority of section 6015), keep any records, or supply any information, who willfully fails to pay such estimated tax or tax, make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more that $10,000, or imprisoned not more than 1 year, or both, together with the costs of prosecution.

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 72-1564

VINCENT J. BERNABEI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial in the United States District Court for the Northern District of Ohio, petitioner, who is an attorney, was convicted of willfully failing to file income tax returns for the years 1965 through 1968, in violation of 26 U.S.C. 7203. The trial judge sentenced him to four years' imprisonment but provided, pursuant to 18 U.S.C. 3651, that petitioner be confined in a jail-type institution for four months with the execution of the remainder of the sentence to be suspended and petitioner placed on probation for the remainder of the four year period. Petitioner was also fined a total of $20,000. The court of appeals affirmed per curiam (Pet. App. 8-9).

Petitioner's only contention here is that he should have been permitted at trial to introduce evidence of marital and financial difficulties which he allegedly experienced during the four prosecution years, claiming that the proposed evidence would have been relevant to his "willfulness" in failing to file the returns.

1. At trial, petitioner testified that he had received substantial gross income during each of the prosecution years, that he had known that he was required to file tax returns for those years, that he had failed to file the required returns, and that the reason for his failure was that he had lacked funds to pay the taxes which his returns would have shown he owed (R. 35, 37-39; see, also, R. 12-13, 17-18.).[1] Petitioner had previously informed Internal Revenue Service agents that he knew he could have filed his returns without immediately paying the tax but that he had not done so because he wanted to avoid tax liens (R. 22-23).

Petitioner was also asked, on direct examination by his counsel, about certain financial transactions occurring prior to the prosecution years (R. 28). Upon objection by the government, petitioner's counsel asserted that he intended to develop testimony respecting "a series of financial difficulties and a series of marital difficulties" (R. 29). The trial judge asked how these difficulties were material, and petitioner's counsel replied only that the "financial pressures, pressures of creditors * * * reflect on the lack of any evil motive" (*ibid.*). The court then ruled (R. 33):

> * * * a lack of funds or an inability to pay does not constitute reasonable cause for failure to file declarations or estimates of tax returns. Therefore, any evidence relative to inablility to pay or lack of funds will be excluded.

2. Petitioner contends that the trial court erred in rejecting his offer of proof. But that offer was irrelevant to the issue of willfulness in the context of this case.

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[1] "R." refers to the record appendix filed in the court of appeals.

Willfulness, under the tax misdemeanor and felony statutes, consists of "a voluntary, intentional violation of a known legal duty." *United States* v. *Bishop*, No. 71-1698, decided May 29, 1973 (slip op.14). Although evidence of inability to pay might possibly be relevant to willfulness in cases where a defendant establishes that he had a good faith belief that he could not lawfully file without paying the tax (see *Yarborough* v. *United States*, 230 F. 2d 56 (C.A. 4), certiorari denied, 351 U.S. 969), petitioner made no such claim. To the contrary, petitioner conceded knowledge of a legal duty to file and admitted deliberately failing to file merely in order to avoid paying the tax.

Similarly, evidence of emotional distress engendered by marital difficulties might be relevant to a defense based upon inadvertence or negligence (see *United States* v. *Gorman*, 393 F. 2d 209 (C.A. 7), certiorari denied, 393 U.S. 832), but petitioner never relied upon or suggested such a defense at trial. In the absence of such a defense, evidence of emotional distress is irrelevant and may be excluded. *United States* v. *Haseltine*, 419 F. 2d 579 (C.A. 9).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

JULY 1973.

FILE COPY

Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1973

No. 72-1564

VINCENT J. BERNABEI,
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Respondent.

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI

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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1973

No. 72-1564

In the Matter of:

VINCENT J. BERNABEI,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI

To The Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States of America:

The Petitioner, Vincent J. Bernabei, petitions the Court for a rehearing of the order of this Court rendered on October 9, 1973, denying the Petition for a Writ of Certiorari to review the judgment of the Court of Appeals for the Sixth Circuit rendered on February 28, 1973, and reaffirmed April 26, 1973, affirming the United States District Court for the Northern District of Ohio, Eastern Division.

A. CERTIFICATE

This petition is presented in good faith and not for delay, and is restricted to grounds of substance although not fully and previously presented, and which grounds are of substantial and controlling effect.

.....

John Kennedy Lynch
Attorney for Petitioner

B. GROUNDS

Grounds for this petition for rehearing are as follows:

1. The Supreme Court of the United States, in denying certiorari, failed to apply its interpretation of the meaning of the word, "willfully", in the misdemeanor statute contained in Section 7203 of the Internal Revenue Code as defined and interpreted by this Court in its opinion rendered May 29, 1973, in *United States* v. *Bishop,* 93 Supreme Court 2008.

ARGUMENT AMPLIFYING GROUNDS FOR PETITION FOR REHEARING

The question raised by the Petition for Writ of Certiorari was based on a conflict existing between the United States Court of Appeals for the 4th Circuit (*Yarborough* v. *United States,* 230 F2 56, cert. den. 351 US 696) and the Ninth Circuit (*United States* v. *Haseltine,* 419 F2 579). In *Yarborough* the Court approved instructions to the Jury that the testimony that the Defendant did not have sufficient cash to pay the tax was evidence that the Jury had a right to consider along with all other facts. To the contrary,

Haseltine held that the trial Court's rejection of evidence related to Defendant's inability to pay taxes was proper.

In the present case, taxpayer Bernabei was not permitted to introduce evidence of his financial problems and marital difficulties to offset the inference of criminal intent. Since this Petition was filed in this Honorable Court, the *United States* v. *Bishop,* 93 Supreme Court 2008, has held that the meaning of the word "willfully" in tax offenses, set forth in Section 7201 to 7207 inclusive of the Internal Revenue Code, has the same meaning and requires proof of bad faith or evil intent; the Court pointed out that the Ninth Circuit in *Abdul* v. *United States,* 278 F2 234, – which involved conviction of tax misdemeanors under Section 2707 (b) of the 1939 Code and Section 7203 of the 1954 Code, based on failure to file involving the defense of inability to pay, – the trial Judge instructed the Jury that the term willful in the misdemeanor counts meant, among other things, "capriciously or with a careless disregard whether one has the right so to act", whereas the same word in the felony counts meant "with knowledge of one's obligation to pay the taxes due and with intent to defraud the Government of that tax by any affirmative conduct".

This Court in *Bishop* rejected the approach in the *Abdul* case and adopted the meaning of willfullness as defined in *United States* v. *Murdock,* 290 U.S. 389, 394-395, holding that the meaning of willfull in the felony and misdemeanor tax offenses have the same meaning.

The Court in *Bishop* said in part as follows:

"B. The hierachy of tax offenses set forth in Sections 7201-7207, inclusive, *utilizes the mental state* of the offender as a guide in establishing the penalty. Section 7201, relating to attempts to evade or defeat tax, has been described

and recognised by the Court as the 'climax of this variety of sanctions' and as the 'capstone of the system of sanctions which singly or in combination were calculated to induce prompt and forthright fulfillment of every duty under the income tax law and to provide a penalty suitable to every degree of delinquency.' *Spies,* 317 U.S. at 497; *Sansone,* 380 U.S. at 350-351. *The actor's mental state* is described both by the requirement that acts be done 'Willfully' and by the designation of certain express elements of the offenses. In Section 7201, for example, the Court has held that, by requiring an attempt to evade, 'Congress intended some willfull commission in addition to the willfull omissions that make up the list of misdemeanors.' *Spies,* 317 U.S. at 499. Similarly, in Section 7207, the Government must show that the document was known by the taxpayer to be fraudulent or to be false as to a material matter.

"All these offenses, except two subsections of Section 7206 viz., subsections (3) and (4), require that acts be done 'willfully'. Although the described states of mind might be included in the normal meaning of the word 'willfully', the presence of both an express designation and the simultaneous requirement that a violation be committed 'willfully' is strong evidence that Congress used the word 'willfully' to describe a constant rather than a variable in the tax penalty formula.

"The Court, in fact, has recognized that the word 'willfully' in these statutes generally connotates a voluntary, intentional violation of a known legal duty. It has formulated the requirement of willfullness as 'bad faith or evil intent', *Murdock,* 290 U.S. at 398, or *'evil motive and want of justification in view of all the financial circumstances of the taxpayer', Spies,* 317 U.S. at 498, or knowledge that the

taxpayer 'should have reported more income than he did'. *Sansone,* 380 U.S., at 353. See *James* v. *United States* (61-1 USTC par. 9449), 366 U.S. 213, 221 (1961); *McCarthy* v. *United States* (69-1 USTC par. 9312), 394 U.S. 459, 471 (1969).

"Until Congress speaks otherwise, we therefore shall continue to require, in both tax felonies and tax misdemeanors that must be done 'willfully', the bad purpose or evil motive described in *Murdock, supra.* We hold, consequently, that the word 'willfully' has the same meaning in Section 7207 that it has in Section 7206 (1)." (Emphasis supplied)

In the subject case, the Respondent, in his memorandum in objection to Petition, argues that this Court in *United States* v. *Bishop, supra,* considers the definition of willfullness as a "voluntary, intentional violation of a known, legal duty", whereas Petitioner relies on the Court's requirement that there be a bad purpose or evil motive.

CONCLUSION

Petitioner implores this Court to reconsider its previous ruling and grant his Petition for Writ of Certiorari so that he may have an opportunity to present in Court in his own defense his financial and marital problems which might counteract any inference of evil motive or bad purpose.

Respectfully submitted,

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